Supreme Court, U.S.
FILED

(1)

No. 95 1140 NOV 13 1995

OFFICE OF THE CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1995

SHIN CHONG YONG

Petitioner

v.

GANNETT OUTDOOR CO., INC. OF SOUTHERN CALIFORNIA, LOCAL UNION NUMBER 831, PICTORIAL PAINTERS, DISPLAY AND DECORATORS I.B.P.A.T. -AFL-CIO DOES 1-5

Respondents

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

SHIN CHONG YONG
2225 Chevy Oaks Circle Dr.
Glendale, Calif. 91206
(818) 243-5193

IN PROPRIA PERSONA

69 pp

QUESTION PRESENTED FOR REVIEW

1) Whether Rule 56 (c), USCA, of the Federal Rules of Civil Procedure and 26 (b) (1) (a) (ii) USCA of the Federal Rules of Civil Procedure and Rule 56 (e) of the Federal Rules of Civil Procedure for summary judgment, become violated where depositions, answers to interrogatories, and admissions on file together with affidavits where taken; when only specifically selected individuals where purposely deposed to favor the Defendants and no real key witness's where deposed in favor of the Plaintiff.

2) Whether this inadequate discovery along with gross negligence and incompetence of Plaintiff's counsel, including a period of complete absence of any counsel violates Amendments V, VII, XIV to the Constitution of the United States of America - the right for due process of law, trial by jury and adequate representation.

3) Whether preferential treatment was used to favor retained individuals in employment, over another out of the favored group in violation of the 1964 Civil Rights Act.

PARTIES TO THE PROCEEDING

Plaintiff-Petitioner:

CHIN CHONG YONG,

Defendants-Respondents:

GANNETT OUTDOOR CO., INC. OF SOUTHERN CALIFORNIA, LOCAL UNION NUMBER 831, SIGN, SCENE, PICTORIAL PAINTERS, DISPLAY AND DECORATOR I. B. A.T. - AFL-CIO, DOES 1-5

TABLE OF CONTENTS

Summary of Facts.....ii.....iii

TABLE OF AUTHORITIES.....iv

RELEVANT STATUTES.....v

REFERENCE TO REPORT OF OPINION.....1

GROUNDS FOR JURISDICTION...... 1

STATEMENT OF THE CASE.....2-10

ARGUMENT.....10-13

THE PLAINTIFF, AND OR INDIVIDUAL CANNOT BE DENIED FULL AND COMPLETE LEGAL REPRESENTATION IN ACCORDANCE TO THE LAWS OF THE LAND, WHETHER THEY BE CIVIL OR CRIMINAL IN NATURE, AND THAT THE CODES OF CIVIL PROCEDURE AND THE AMENDMENTS TO THE UNITED STATES CONSTITUTION ARE WRITTEN FOR ALL AND NOT FOR A SELECT PARTY TO THEIR SUPREME ADVANTAGE, BUT ALSO FOR THE INDIVIDUAL WHO THROUGH NO FAULT OF HIS OWN WAS DENIED FULL AND PROPER REPRESENTATION BY COUNSEL, EITHER BY MONETARY DEFICIENCY OR BY A SEQUENCE OF EVENTS UNCONTROLLED BY THE INDIVIDUAL, AND THAT RACIAL PREFERENCES VIOLATE THE CIVIL RIGHT ACT OF 1964.....12

SUMMARY OF FACTS

I. The fact is that Mr. Shin Chong Yong through circumstances beyond his control was denied proper legal counsel in terms of his complete representation in this case.

II. The EEOC maintains a backlog of 100,000 cases, this fact may justify why the EEOC of Los Angeles, California could tend to discourage potential cases.....4

A. Shin, accompanied by co-worker Scalese obtains evidence that he attempted to file a claim on October the 8th of 1991 well in advance of the time limit.....6

B. At that meeting Shin was intentionally discouraged to forfeit his claim, based upon advice by the EEOC representative at that time. No investigation of the case was ever attempted; case concluded on a 15 minute interview.....6

C. Shin was entitled to 100% representation with an investigation of the facts in his case. Shin's counsel was grossly negligent in his responsibility in terms of communicating with the EEOC to justify the issues presented.....8

D. Addendum A of proposed contract, gave rights of immunity to lay-off to a select group, Local Union 831 fraudulently allowed that group to vote for the contract. This caused the rights of others to be jeopardized who were not in the protected group.....7-9

SUMMARY OF FACTS CONTINUED

III. The most important key witness's in this case were not deposed, in terms of numbers of key witness's deposed to favor Mr. Shins case we arrive at zero.....5.

IV. The Supervisor Toni Lopez discreetly informed specific individuals that they would not be the employee's to be laid-off, this occurred after the department employees voted down the contract designed to terminate people out of seniority. The fact is that any employee with 35 years of seniority would not want to lose it; much seniority was at stake here for most employees. .....2.

A. Fraud was committed by the Gannett management to win the contract to terminate people out of seniority. The Union Local 831 was negligent in its representation in terms of thoroughly researching the actual facts in existence at the time.....2.

B. The Good Ole Boy's Club consisted mainly Mexican people, including supervisors. The Gannett Company was preferential in that most employees were such. A subsidiary company dealing with bus shelters, was all Mexican. A Gannett Subcontractor employed 99% Mexican Of the nine laid-off only one was Mexican. 2 Mexican workers of less experience and skill were retained over Mr. Shin.....2.

TABLE OF AUTHORITIES

CASE PAGE

Arthur Bruce v. United States of America.,
379 F 2d. 1123, (1967) 114 (1.).....6

Black Panther Party v. Valuteck Inc.
661 F2d 1243 (1981).....4

Edwards v. United States
256 F 2d 707.....6

First National Bank of Arizona v. City Services company
391 US 253, 20 Led. 2Nd. 569, 88 S. Ct. 1575.....3

Garret v. City and County of San Francisco
8 Fed. Rules of Serv. 3D 352. 118 F 2d
1515 (CA 9 1987.....3

Smith v. Shaver Stores Co.,
4 Fed. Rules of Serv. 2D 133L Ed 1961.....5

United States v. Diebold Inc.
369 v. 654, 8 Led. 2D. 176, 82 S. Ct. 993.....4

UAI Technology Inc. V. Valuteck Inc.
123 F.R.D. 188 MDNC (1988).....5

Wilcoxin v. Aldredge
(1941) 182 Ga. 634, 15 SE @ d 873,
146 ALR 365.....6

RELEVANT STATUTES Page

28 U.S.C.
Section 1254.....1

Fed. Rules of Civil Proc.
56 (c).....5&12

Fed. Rules of Civil Proc.
56 (e).....11

Fed. Rules of Civil Proc.
26 (b) (1) (a) (ii).....12

The United States Constitution
Amendment VII.....13

The United States Constitution
Amendment IX.....13

The 1964 Civil Rights Act
Section 703 (42 U.S.C.
2000e-2) (2) (j).....12

Supreme Court
Rule 13. 5.....1

REFERENCE TO REPORT OF OPINION

There is no published opinion, official or unofficial, delivered in this case. The judgment and memorandum of the Ninth Circuit Court of Appeals are included in the Appendix at Tab A. The Order Granting Summary Judgment and the Judgment of the District Court are included on the Appendix at Tab B.

GROUNDS FOR JURISDICTION

The judgment to be reviewed in this action was entered by the Ninth Circuit Court of Appeals on August 15, 1995. (The Judgment and Memorandum are included in the Appendix at Tab A.) The Order Granting Summary Judgment and the Judgment of the District Court are included in the Appendix at Tab B.

This Honorable Court has Jurisdiction to review the Judgment by writ of certiorari under 28 U.S.C. § 1254.

This Honorable Court has granted a 60 day extension of time as of November the 16 , 1995.

STATEMENT OF THE CASE

In 1985 Gannett Outdoor Advertising of Southern California completed construction of a new billboard plant for hand painted billboards. The plant proved to be inefficient in that it was unable to meet the demands of the painters as they finished each billboard; this caused by the constant breakdown of machinery. The company claimed it was unable to compete with the new technology of computer "painted" billboards. Patrick Outdoor Advertising a competitor, was negotiating a new contract specifying a lay-off of ten people, both companies were under the same Local Union 831 contract which contained a "Most Favored Nations Clause." Employees of the Gannett paint studio requested a statement as to the possibility of layoffs A meeting was held in the presence of paint studio employees by the CEO John Martin were he emphatically stated that no-one would be laid-off. Ten people were slated for lay-off by the newly negotiated contract and a vote was taken to lay people off "out of seniority." The contract was defeated by a few votes, people did not want to lose their seniority. Prior to the second vote, the paint studio supervisor discreetly informed selected individuals of the "Good Ole Boys Club" (mostly mexican) that they would not be laid-off. On the second vote the contract was ratified by a few votes and one female and 8 males were laid-off. 3 were ex-shop stewards, one participated in the contract negotiations, only one was mexican and a total of 5 filed

STATEMENT OF THE CASE CONTINUED

wrongful termination suits, resulting in these proceedings.

The genuine issue of material fact as required by Rule (56) summary judgment, could not be realized because the defendants covered the real evidence and material facts by false statements as verified by all plaintiffs in the readings of depositions, and declarations. These false statements could not be disputed unless a trial was granted, First National Bank of Arizona v. Cities Service Co. 391 US 253, 20 Led. 2d 569, 88 S. Ct. 1575. Gannett opportuned to "get there first with the most questions asked," most importantly the concrete weight of real evidence could only be factually supported by the deposition of key witnesses; there was no full discovery for the plaintiffs. For this reason the plaintiff had no ample opportunity to full disclosure of all the facts, Garret v. City & County of San Francisco. 8 Fed. Rules of Serv. 3d 352, 818 F2d 1515 (CA 1987) due to a 3 time change of attorneys plaintiff afforded little time for essential discovery. Discovery that was completed by plaintiffs attorneys was with grossly inadequate consultation of the plaintiff, extending to not informing plaintiff of the date for depositions. Gross negligence reappeared with inappropriate questions asked at deposition, caused by lack of communication with Shin. Key witnesses not deposed where, the CEO of the plant, plant supervisor, supervisors secretary, manager in charge of contract negotiations, shop steward, 3 ex-shop stewards,

STATEMENT OF THE CASE CONTINUED

who held critically damaging testimony in opposition to the defendants. At least 6 other artists not part of the "Good Ole Boys Club" could render just testimony of actual evidence. Favoritism was witnessed by Shin, when a co-worker Xavier Montez said, he would try to influence Lopez, the supervisor to exclude Shin in lay-off, Montez was retained as part of the "Club." The non-moving party must show facts and evidence that there exists a genuine issue for trial, this could only be exercised deposing key witnesses in this case, black Panther Party v. Smith 661 F2d 1243 (1981) A party moving for summary judgment bears the burden of showing the absence of any genuine issue of fact and that there is no question as to the credibility of it's evidentiary material, where there is the slightest doubt as to the facts the motion for summary judgment should be denied. The 9th Circuit Court had no consideration for the slightest doubt, to favor the plaintiff. Under Rule 56 (c) inferences from underlying facts contained in depositions, affidavits must be viewed in light favorable to those opposing the motion for summary judgment States v. Diebold Inc. 369 US 654, 8 Led 2d 176, (1) 82 S. Ct. 993. This was not evident when the 9th Circuit Court took the absolute word of the defendants employees declarations(memorandum P.5) Appen. A. Under the extreme stress of lay-off these people were forced to favor the defendants in order to retain their employment, the

STATEMENT OF THE CASE CONTINUED

end results were precisely that, they were given continuing work opportunities with the defendants while others were terminated. The 9th. Circuit Court stated that the declarations of 2 ex-shop stewards with years of experience with grievances, one of which was selected by popular demand as workplace art director; here the 9th Circuit Court States that "reasonable persons can differ when assessing artistic ability or disruptive behavior. The 9th Circuit Court openly discriminates against parties who held the most experience, in terms of rectifying on the job skill, ability and grievances. The Declarations to favor the plaintiff should have carried more weight, when adding the years of work experience; as shop stewards their knowledge should have carried heavier weight in the declarations. Rule 56(c) requires to review the entire record, the entire record did not exist because the key witnesses where not deposed, UAI Technology, Inc., Valuteck Inc. 123 F.R.D. 188 MDNC (1988). Had they been deposed suspected fraud and deceit could have been alleged to prove genuine issues of fact, as it did with Smith v Shaver Stores Co., 4 Fed. Rules of Serv. (2d 133 L Ed Pa. 1961) In action on fraud and deceit there are genuine issues of fact-summary judgment denied. Gannet had already committed misrepresentation with the fraudulent settlement of co-plaintiff Tony Scalese, where Gannett was judged guilty by the Central District Court of L. A. Calif.; case remanded to Central District

STATEMENT OF THE CASE CONTINUED

for hearing concluding in the re-instatement of plaintiffs case against Local Union 831. The issues herein were not brought to light because no full discovery took place for Shin, for reason that his counsel was considered incompetent by both defendants and plaintiffs, Wilcoxon v. Aldredge (1941) 192 Ga. 634, 15 SE 2d 873, 146 ALR 365, where attorneys are negligent and incompetent and where representation was lost created violation of the 5th Amendment to the Constitution. In Edwards v. United States 256 F2d 707 and Arthur Bruce v. United States of America., 379 F2d 113 (1967) 114 (1.) where gross incompetence blotted out essence of substantial defense created a violation of the 7th Amendment to the Constitution. In June of 1992, 289 days prior to the deadline to file a complaint with the EEOC of L. A. Calif. Shin filed a complaint at that office. Shin had no control over the competence or organization of the employees staffed at that office. Shin negotiated with his attorney in reference to the complaint at the EEOC, instead of exercising his responsibility with his client in terms of solving the problems related to Shins case, counsel did not effectively communicate and was unusually unavailable. The EEOC told Shin that there was no need to file because he hired an attorney, here is were Shins counsel did not get back with the EEOC to clarify the matter. Furthermore, on October 8, 1991 Shin and Scalese attempted to file a claim at the EEOC the officer-

STATEMENT OF THE CASE CONTINUED

answering the claim stated because Gannett did retain older workers they had no case, this done with no officer to investigate the actual facts of each case. Shin was laid-off according to Addendum A of the new local 831 contract, creating an exclusive class: those 55 years and older, and those with 30 years service, and those with better skills were immune to lay-off. Shins lay-off dealt with Addendum A, not only age discrimination with this Shins counsel lost direction with incompetent representation. Gannett admitted it kept no employee work records and claimed any they did have were stolen. Shin was the only outside pictorial artist he painted billboards up to 100 feet in height on scaffolds for 17 years, he trained those in his crew. Outside billboard painting requires special training which inside artists did not have nor did they want to work at extreme heights. Others in the outside crew were not pictorial artists. A pictorial artist title means higher skill and ability, and more money per hour. Those retained in lay-off of the outside crew were members of the "Good Ole Boys Club"with little experience,skill, paid less, and of mexican decent. Due to the gross negligence and incompetence, counsel failed to properly address these issues causing the 9th Circuit to overlook the factor of Addendum A. Include the fact that Shins counsel was the direct law office neighbor of the Gannett attorneys, frequenting the same mall lunch areas. To include-

STATEMENT OF THE CASE CONTINUED

with Mr. Wiess as plaintiffs attorney, plaintiffs attached another attorney Mr. Edward Smilow who stalled and stretched the case for every extra day he could. Smilow had a serious heart problem and he did not inform his clients or defendants of the critical condition until very late. Shin and other plaintiffs were deprived of full and quality representation and discovery due to this situation. Mr. Smilow finally succumbed to a severe and permanently crippling heart attack, forcing him to quite his law practice thereby reducing the plaintiffs to zero legal counsel. Mr. Wiess was unanimously terminated by all clients, for gross negligence and incompetence thereby stalling the case longer. All plaintiffs were stranded for over 2 months until another counsel was secured and because he accepted the case late in terms of actually deciding to take the case, little time was left for quality representation in terms of full discovery. Due process was also jeopardized by these negative circumstances because plaintiffs had absolutely no control over them. Finally Local 831 Union was grossly negligent for these reasons: 1. There was no permanent assigned agent to the billboard painters of Gannett.

2. The union manager lied in his deposition and had no experience in the billboard indoustry.
3. He was not a signpainter or artist.
4. He was suspected of collusion based on the fact that he assigned the Gannett assistant supervisor to negotiate the -

STATEMENT OF THE CASE CONTINUED

contract, and that he relied upon the shop steward who also was given the authority of substituting for Lopez, the supervisor of all the billboard artists. The painters were enraged that Martinez the shop steward was given the authority to substitute as plant supervisor, they wanted a recall vote. The union manager sided with the shop steward. The shop steward managed to be included into the "Good Ole Boys Club"(mostly mexican).

5. Grant Mitchel the union manager allowed those that were immune to lay-off to vote against those union members who had none, for ratification of the contract.

6. The union manager completely divorced himself in terms of any kind of assistance to those who were laid-off.

DEPOSITION OF THE STUDIO MANAGER

The acting paint studio manager, Allen Rossi was deposed and much of his deposition had to be challenged in terms of lies; all plaintiffs agree to the falsifications planted in his deposition. His career was at stake thusly he had to falsify many questions presented to him, or he would be fired by Gannett, results like this require a trial and complete discovery.

A. Mr. Rossi acted as art director in actuality the previous art director would not allow him to paint anything with real tecqnicalitys to it. Most of the painters were even more skilled than he. Yet, he was to determine skill and ability under Addendum A of the new contract.

STATEMENT OF THE CASE CONTINUED

A basic picture of the many issues have been presented to the Honorable Court for its review with this Statement of the Case.

ARGUMENT

THE PLAINTIFF, AND OR INDIVIDUAL CANNOT BE DENIED FULL AND COMPLETE LEGAL REPRESENTATION IN ACCORDANCE TO THE LAWS OF THE LAND, WHETHER THEY BE CIVIL OR CRIMINAL IN NATURE, AND THAT THE CODES OF CIVIL PROCEDURE AND THE AMENDMENTS TOTHE CONSTITUTION ARE WRITTEN FOR ALL AND NOT FOR A SELECT PARTY TO THEIR SUPREME ADVANTAGE, BUT ALSO FOR THE INDIVIDUAL WHO THROUGH NO FAULT OF HIS OWN WAS DENIED FULL AND PROPER REPRESENTATION BY COUNSEL, EITHER BY MONETARY DEFICIENCY OR BY A SEQUENCE OF EVENTS UNCONTROLLED BY THE INDIVIDUAL, AND THAT RACIAL PREFERENCES VIOLATE THE CIVIL RIGHTS ACT OF 1964.

A. **The Gannett management and the Union committed. fraud in its lay-off of the 9 employees.**

B. **The Statement of the Case will qualify for prima facie evidence to prove such, upon full discovery and trial.**

C. **Confidence in the decision of the Central District Court is limited.**

The 9th. Circuit Court stated in its Memorandum filed August 15, 1995, that it must consider all the evidence. Full discovery and trial could only have justified this point. Shin was initially laid-off according to Addendum A of the contract.

ARGUMENT CONTINUED

With full discovery and trial a genuine issue of fact will have surfaced in accordance Rule 56 (c) and (e) of the Fed. Rule of Civil Procedure. These rules were automatically violated by the gross negligence of Shins counsel and no counsel at all, as stated within the "Statement of the Case." The issue of Addendum A was to be included in Shins lay-off suit.

Confidence in the decision of the Central District Court is limited in that: 1. Gannett maintained political influence with the city government.

2. An ex-city councilman was the Gannett lobbyist in the state capitol of California.

3. Gannett promoted with its billboards free advertisements for the city and its officials, including ads for re-election.

4. The Chairman of the Board of Gannett was found guilty of a felony for Federal Antitrust violations and was only given weekend duties as a sentence were others would have been incarcerated.

5. Other freebies for city officials were provided such as trips and maintenance services to lobby their influence.

In view of these 5 facts, it may be likely that a decision to favor Gannett in a summary judgment decision by a judge of the court of the City of Los Angeles, may have occurred and as

ARGUMENT CONTINUED

plaintiff in a suit against Gannett Shin cannot have the confidence of the Central District Court decision.

In rule 26 b (1) (a) (ii) of the Fed. Rules of Civil Procedure states: the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, not so in shins case.

It is Shins understanding that racial preferential treatment was given to those employees retained in his job category- Outside Painter. In the Civil Rights Act of 1964 Section 703, 42 U.S.C. 2000e-2 (m) An unlawful employment practice is established when the complaining party demonstrates that race was a motivating factor in the employment practice.
(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of race. § 2000-e2.(2) to limit, segregate, or classify his employees or applicants for employment opportunities or otherwise adversely affect his status as an employee.

Questions on skill and ability, seniority, work production company records and fraud can truly be answered in a court of law, with testimony by actual witnesses under oath at trial.

ARGUMENT CONTINUED

Combining the decisions of both the 9th Circuit Court of Appeals, San Francisco California and the Central District Court of Los Angeles California these decisions violated Shins right to trial.

A. Amendment VII of the United States Constitution States: The right of trial by jury shall be preserved.

B. Amendment XIV of the United States Constitution States: Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection under the laws. Both Court decisions denied Shin equal protection under the law and trial by Jury in that testimony from witnesses who held critical facts in his favor; were never deposed. In their decisions, the 9th. Circuit and Central District Court extinguished Shins opportunity to expose testimony that would in addition to a civil case, create a substantial criminal case.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons:

The case raises an important question, for it would represent a dangerous incursion for the rights of the common person to seek and receive proper justice in their case.

A. The decision of the Ninth Circuit Court of Appeals of California, failed to establish and comprehend the true essence of the case, and that the real and factual issues were totally blotted out through gross incompetence, negligence and discovery by plaintiffs counsel for which plaintiff Shin had no control of.

B. For the reasons set forth in the Statement of the Case-grossly inadequate representation and a time without counsel.

C. The issues presented violate the Amendment rights of the Petitioner- Amendments, VII, and XIV of the United States Constitution.

Including: Federal Rule of Civil Procedure 26 (b) (1) (a) (ii) 28 USCA, Rule 56 (c). And, (e) of the Federal Rules of Civil Procedure and Section 703 of the 1964 Civil Rights Act (42 U.S.C. 2000e-2) (2) (j).

IN CONCLUSION

For the sum of the issues presented herein, it is respectfully requested that the Petition be granted and the Honorable Court review this matter.

Dated this 12 day of January, 1996

Respectfully Submitted,

By: Chong Yong Shin
SHIN CHONG YONG:
In Propria Persona

2225 Chevy Oaks Circle Dr.
Glendale, California 91206
(818) 243-5193

APPENDIX

TAB	DOCUMENT	
A	Memorandum of the Ninth Circuit Court of Appeals entered on August 15, 1995	A-1
B	Order Granting Summary Judgment and the Judgment of the Central District Court entered June 14, 1993.	B-12
C	Relevant Statutes, including Amendments, VII, and XIV to the Constitution of the United States. Federal Rules of Civil Procedure 56 (c) USCA Federal Rules of Civil Procedure 56 (e) and 26 (b) (1) (a) (ii) 28 USCA Section 703 of the Civil Rights Act of 1964 (42 U.S.C.A. 2000e-2) (2) (j). United States Supreme Court Rule 13.5	C-36

APPENDIX A

SHIN CHONG YONG, Plaintiff-Appellant, v.

and

GANNETT OUTDOOR COMPANY, INC., of SOUTHERN CALIFORNIA; LOCAL UNION 831 SIGN, SCENE, PICTORIAL PAINTERS, DISPLAY AND DECORATORS I.B.P.A.T. AFL -CIO

Defendants-Respondents.

No. 93-56114 D.C. No. CV-92-01206-JGD

MEMORANDUM*

NOT FOR PUBLICATION

United States Court of Appeals, Ninth Circuit

Filed and entered August 15, 1995

APPEAL FROM the United States District Court for the Central District of California

John G. Davies, District Judge Presiding

Argued and submitted August 7, 1995** Pasadena California

Before: THOMPSON, LEAVY, and TROT Circuit Judges

---

* This disposition is no appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

MEMORANDUM CONTINUED

Denise Curtis-Locicero and Shin Chong Yong appeal the district court's grant of summary judgment in favor of Gannett Outdoor Company, Inc. ("Gannett") and Local Union 831, Sign Scene, Pictorial Painter, and Display Decorators ('Local 831'), in Ms. Locicero and Mr. Shin's lawsuit alleging various employment related claims in connection with Gannett's implementation of a work force reduction. Ms. Locicero maintains that Gannett's decision to terminate her employment was the result of sec discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (Title VII"). Ms. Locicero also asserts a claim pursuant to section 301 (a) of the Labor Management Relations Act, 29U.S.C. § 185 (a), alleging that Gannett's decision to terminate her employment breached the collective bargaining agreement ("CBA"). Mr. Shin alleges he was laid-off by Gannett on account of his age, and challenges the district court's determination that he failed to timely file a claim with the Equal Employment Opportunity Commission ("EEOC") as required by § 626 (d) et seq. ("ADEA"). We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291, and we affirm.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo.

Jesinger v. Nevada Fed. Credit Union, 24 F. 3D 1127, 1130 (9th Cir. 1994). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56 (c). Id.

DISCUSSION I

Ms. Locicero argues that genuine issues of material fact regarding her Title VII claim make a grant of summary judgment inappropriate,

To survive a summary judgment motion, a plaintiff asserting claim under Title VII must fist establish a prim facie case of discrimination. Walis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). Establishment of a prima facie case creates a presumption of unlawful discrimination, and the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for its employment decision. Id. Once the employer fulfills this burden of production by offering a legitimate nondiscriminatory reason for its employment decision, the presumption of unlawful discrimination "simply drops out of the picture." Id. (Internal quotations omitted). The presumption having dropped out of the picture, the plaintiff's evidence must be sufficient to permit a rational trier of fact to find that the employer intentionally discriminated against the plaintiff. Id. At 892. In determining that there is a triable issue of fact, we must consider all evidence, including evidence offered to establish the prima facie case, as well as evidence

submitted to show the employer's proffered reason for the adverse employment decision is a pretext for another, discriminatory motive. Id. at 889, 892. "[T] here will always be a question for the fact finder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true." Washington v. Grarrett, 10 F. 3d 1421, 1433 (9th Cir. 1993); see also Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994) (explaining that after making out a prima facie case the plaintiff "must only produce evidence from which a rational fact finder could infer that the company lied about its proffered reasons for his dismissal" (internal quotations omitted). However, "[i]n response to the defendant"s offer of nondiscriminatory reasons, the plaintiff must produce specific, substantial evidence of pretext." Wallis, 26 F. 3D at 890 (internal quotations omitted). The district court concluded, and the parties do not dispute, that Ms. Locicero made out a prima facie case of discrimination. Ms. Locicero is a member of a protected class and she was discharged from a job for which she was qualified while others not in her protected class were retained. See Washington, 10 F. 3D at 1434 (articulating the elements of a prima facie case under Title VII where a reduction in the work force is alleged to have been carried out in a discriminatory fashion). The parties also do not dispute that Gannett met its burden of producing legitimate, non-

Discriminatory reasons for Ms. Locicero's Layoff. Pursuant to Addendum A of the CBA, CBA Gannett was permitted to layoff up to ten employees based on a consideration of employee's 1) comparative skills and artistic abilities, 2) seniority, and 3) comparative performance, discipline, attendance, and production capability. In accordance with the authority provided to the company by Addendum A, Vice President William J. Ripp asked manager Allen A. Rossi and supervisor Toni Lopez to recommend independently nine employees who should be included in the company's layoff. Both Mr. Rossi and Ms. Lopez selected Ms. Locicero. Ms. Lopez chose Ms. Locicero after referring "to the criteria in Addendum A to the contract and the skill sets which were a breakdown of the criteria in Addendum A." ER Tab 37 at 2-3. Ms.Lopez also noted that as paint studio supervisor she had received numerous complaints form other billboard artist about Ms. Locicero's disruptive conduct. Specifically, employees Jose Colocho, Lalo Palcios, and Ralf Valencia "each complained, on several occasions....that Locicero would sing loudly and break into very loud laughing. They complained that Locicero's actions destroyed their concentration on their work and made them less productive. I verbally counseled Locicero about her disruptive behavior on two occasions during 1991." ER Tab 37 at 2. Mr. Ripp "selected Locicero because her relative skill, ability and

Experience was less than the other artists. In addition, I was aware of complaints regarding Locicero's conduct in the workplace, which included shouting matches with other employees, loud constant singing and loud laughing attacks at her workstation." Gannett's SER Tab 2 at 3. Mr. Rip, together with Mr. Rossi and Ms. Lopez, reviewed the joint list of identified employees and considered each person on the basis of the criteria in Addendum A. They "reviewed the employees' comparative attendance figures, disciplinary warning information, artistic abilities and skills , performance, production capability, flexibility, and seniority." Gannett's SER Tab 1 at 4. The final list was submitted to Gannet President John Martin, who approved it. Ms. Locicero, a journeyman painter, was one of seven billboard artists laid-off, an the only female; two other female journeymen were retained. Because Gannett fulfilled its burden of production by offering a legitimate, nondiscriminatory reason for its employment decision, the issue on appeal is whether Ms. Locicero raised a genuine issue of material fact as to pretext. See Wallis, 26 F. 3d at 892. We conclude, that on the evidence submitted, Ms. Locicero failed to refute Gannett's reasons for her discharge and therefore failed to carry her burden of establishing a triable issue of fact on the ultimate question of whether Gannett intentionally discriminated against her. See id. Ms. Locicero offers no direct evidence showing Gannett's

Employment decision was motivated by an effort to discriminate on the basis of sex. Instead, Ms. Locicero submits several affidavits which she claims would allow a jury to infer the unlawful motive underlying Gannett's action. In the first affidavit, Ms. Locicero declares she is as qualified as the artists retained and, while admitting to a disruptive episode involving Maria Gonzalez, states she was never written up for any disciplinary action. Ms. Locicero's subjective personal judgments concerning her skills do not raise a genuine issue of material fact. Schuler v. Chronicle Broadcasting Co., Inc., 793 F. 2D 1010, 1011 (9th Cir. 1986). FMs. Locicero's observation that her file is free of disciplinary actions does not controvert Ms. Lopez and Mr. Rossi's sworn statements that several of Ms. Locicero's fellow employees repeatedly complained of her disruptive behavior. Next, Ms. Locicero points to the affidavits of former artists David Medore, Tony Scalese, and Walter Modern Stewart, who all state that Ms. Locicero was more qualified than some retained artists and that Ms. Locicero was no more disruptive than other employees. These declarations, however, only serve to demonstrate that reasonable person can differ when assessing artistic ability or disruptive behavior. To survive summary judgment, Ms. Locicero must do more- she must show the reasons asserted by Gannett for her discharge are a pretext for sex discrimination; at a minimum she must submit enough

Evidence to permit a rational trier of fact to find that Gannett's explanation for dismissal is not true. Washington, 10 F. 3D at 1433. Contrary assessments of the discharged employee's performance do not undermine the legitimacy of the employer's justification for the business decision. Anderson, 13 F. 3D at 1125. An employers mistaken belief, ill informed opinion, or misguided assessment simply are not grounds for inferring a Title VII violation. See id. Finally, Ms. Locicero focuses on Mr. Rossi's statement that prior to the layoff he considered Ms. Locicero 'Promotable from Journeyman to Pictorial Artist based on her artistic ability." Gannett's SER Tab 2 at 4. We cannot agree with Ms. Locicero that this statement by Mr. Rossi is inconsistent with Gannett's proffered reason for her discharge. In recommending Ms. Locicero for dismissal, Mr. Rossi considered not only her artistic ability, but her relative experience and disruptive behavior as well. Moreover, Mr. Rossi was only one of four Gannett officials involved in the process of identifying employees who, under the criteria allowed by Addendum A were eligible for layoff. Under these circumstances, the fact that prior to Gannett's efforts to implement Addendum A. Mr. Rossi considered Ms. Locicero potentially promotable, is not enough standing alone to allow a finding that Gannett's explanation for discharging Ms. Locicero is pretextual. Our consideration of the relevant record reveals no genuine issues

Of material fact; the district court properly granted summary judgment on Ms. Locicero's Title VII claim.

II

Ms. Locicero also sought to bring a section 301 claim against Gannett for breach of the CBA. See Labor Management Relations Act, 29 U.S. C. § 185 (a). However, before an employee is entitled to review of a section 301 breach of contract claim, the employee must demonstrate she has exhausted the contractually provided grievance procedures. Vaca v. Sipes, 386 U.S. 171, 184 (1967). Ms. Locicero concedes she never filed a grievance regarding her layoff. She asserts, however, that in her case the exhaustion requirement should be excused because her failure to file a grievance was due to the union's breach of its duty of fair representation. See id. At 185. Specifically, Ms. Locicero claims that Local 831 general secretary Grant Mitchell prevented her from filing a grievance by opining ' it would be futile because of the broad discretion of Addendum A." ER Tab 46 at 23. " A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." Vaca 386 at 190. We will assume without deciding, that Mr. Mitchell's statement "caused" Ms. Locicero to refrain from filing the grievance. Even so, Ms. Locicero has failed to introduce any competent evidence showing that Mr. Mitchell made the

Statement in bad faith or with discriminatory intent, and such a statement, as a matter of law, does not rise to the level of being arbitrary. "We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance." Peterson v. Kennedy, 771 F. 2D 1244, 1254 (9th Cir, 1985), cert. denied, 475 U.S. 1122 (1986). The evidence does not suggest that Mr. Mitchell did anything other than interpret the scope of Addendum A and apply it to the facts of Ms. Locicero's dismissal, from which he concluded a grievance would not succeed. We will not "attempt to second-guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made." Id. The District Court properly granted summary judgment on Ms. Locicero's section 301 claim.

III

Mr. Shin asserts his dismissal by Gannett was the result of age discrimination in violation of the ADEA. In order to bring such a claim in federal district court, the plaintiff must demonstrate he filed a charge with the EEOC within 300 days after the alleged unlawful practice occurred. ADEA § 626(d) Title VII § 2000e-5 (e). " This circuit treats this notice requirement as a statute of limitations." Pejic v. Hughes Helicopters, Inc., 840 F 2d 667, 675 (9th Cir. 1988). A charge is deemed to be filed with the EEOC upon receipt of the

Document. 29C.F.R. § 1601. 13 (a) (4) (ii) (a); Taylor v. General Tel. Co. Of the southwest, 759 F2d 437, 440 (5th Cir. 1985). All the parties agree and the EEOC concurs, that Mr. Shin filed a charge on July 16, 1992. This filing, however, occurred more than 300 days after Mr. Shin was discharged. Mr. Shin claims to have filed a handwritten affidavit of a age discrimination on June 19,1992 289 days after the effective date of his layoff. In his sworn statement, Mr. Donald Burris, deputy director of the Los Angeles District Office of the EEOC, explains that a charge is filed by his office once it is received, and that the only charge filed by Mr. Shin occurred on July 16, 1992. Gannett's SER Tab 3 at 1. Mr. Shin offers no competent evidence to show the EEOC received his charge prior to the expiration of the 300 day period. Accordingly, Mr. Shin's claim is time-barred. See Pejic, 840 F.2d at 675.

CONCLUSION

The district court's order granting summary judgment for all defendants is AFFIRMED.

APPENDIX B

DENISE CURTIS-LOCICERO, Plaintiff

SHIN CHONG YONG, Plaintiff

and

GANNETT OUTDOOR CO., INC. OF SOUTHERN CALIFORNIA, LOCAL UNION NUMBER 831, SIGN, SCENE, PICTORIAL PAINTERS, DISPLAY AND DECORATORS I.B.P.A.T. -AFL-CIO, DOES 1-5

Defendants.

No. CV 92-1206 JGD
CV 92-5433 JGD

United States District Court
Central District of California
Filed and Entered June 14 1993

On September 8, 1992, Plaintiff Shin Chong Yong filed a complaint alleging cause of action for (1) age discrimination and (2) ERISA violations. On February 25, 1992 two other Plaintiffs filed a complaints besides Lo-Cicero. The Court concluded plaintiffs did not sustain there burden and defendants were Granted summary judgment. DATED 6/10/93

s/ JOHN G. DAVIES
United States District Judge

Summary Judgment and defendant Local 831's Motion for Summary Judgment came before the Court for argument. The Court has reviewed and considered the parties' papers and the oral arguments of counsel. Based on this review, the COURT HEREBY GRANTS Gannet Outdoor Co.'s motion for summary judgment in its entirely, and GRANTS Local 831's motion for summary judgment in its entirely.

FACTS

On February 25, 1992, plaintiffs Denise Curtis-Locicero, Walter Stewart and Michael Jones filed a complaint against defendants Gannet Outdoor Co., Inc. Of Southern California ("Gannett") and Sign, Scene, Pictorial Painters, Display Decorators, Local Union 831 ("Local 831" or "the Union"), and Does 1-5. Their complaint alleges four causes of action for (1) employment discrimination under 42 U.S.C. § 1981; (2) employment discrimination under Title V11; (3) breach of collective bargaining agreement and unfair representation; and (4) ERISA violations.

On February 22, 1993, pursuant to defendants' motion, the Court dismissed Mr. Jones' action. Mr. Stewart has voluntarily dismissed his claims.

On September 8, 1992, plaintiff Shin Chong Yong filed a complaint against defendants Gannett, Local Union 831, and Does 1-5. His complaint alleges cause of action for (1) age discrimination; and (2) ERISA violations.

Defendant Gannet operates a paint studio for production of handpainted outdoor billboards. Defendant Local 831 is a labor organization that represents employees in this industry.

As the demand for computer generated billboards has increased, the market for handpainted billboards had declined. Between 1989 and 1991, client requests for Gannett's handpainted billboards decreased by almost 30%, whereas the number of Gannett's paint studio employees decreased only minimally by natural attrition. By early 1991, Gannett determined that a layoff of approximately 20% of the existing paint studio workforce was necessary.

In Spring of 1991, during negotiations for a new collective bargaining agreement, Gannett discussed the need for a reduction in workforce with defendant Local 831. After nearly six months of negotiation, Gannett and Local 831 reached a Collective Bargaining Agreement which allowed a one-time layoff of up to ten paint studio employers based on management's evaluation of certain criteria. The criteria for the layoffs were set forth in Addendum A to the Collective Bargaining Agreement, and included (a) comparative skills and artistic ability; (b) seniority; (c) performance; (d) discipline and production capability; and (e) Gannett's needs in particular job classifications. The Collective Bargaining Agreement excluded from the layoff employees with more

than 30 years seniority, as well as employees over the age of 55. The Collective Bargaining Agreement was ratified by the Union membership, and became effective on September 1, 1991. Thereafter, Gannett's Vice President and Operations Manager, William Ripp, its Bulletin Manager, Allen Rossi, and its Paint Studio Supervisor, Toni Lopez, evaluated the company's future needs and determined that it was necessary to lay off seven painters and two helpers. Based on the criteria set forth in Addendum A, Rossi and Lopez separately selected seven artists to be laid off. Denise Curtis-LoCicero ("LoCicero") and Shin Chong Yong ("Shin") were identified on both lists. These recommendations were then discussed and approved by William Ripp and Gannett's President, John Martin. On September 6, 1991, Gannett laid off nine studio employees. Five of the nine, including LoCicero and Shin, subsequently sued both Gannett and the Union, alleging a variety of employment related claims. Denise Curtis-LoCicero had worked for Gannett since November of 1985, when she was hired as an apprentice artist and assigned to the darkroom. After six months, LoCicero was transferred to the paint studio, where she worked as an apprentice artist until approximately June of 1989, when she was promoted ahead of schedule to Journeyman artist. LoCicero alleges that throughout her employment with Gannett, she was subjected to off-color comments of a sexual nature, and other harassing

Conduct. In 1987, LoCicero filed a written complaint regarding the alleged sexual harassment, and Gannett suspended the accused employee, Walter Stewart, as a result. LoCicero never filed other written complaints regarding sexual harassment, but she allegedly complained to Allen Rossi, Gannet's Bulletin Manager, and Toni Lopez, the Paint Studio Supervisor. Rossi allegedly told LoCicero that she needed thicker skin, and thus LoCicero was dissuaded from complaining further. In late 1989, LoCicero requested a promotion from Journeyman to Pictorial Artist. Rossi allegedly promised LoCicero that she would be trained and considered for the promotion, but she never received it. Subsequently, three black men were promoted over LoCicero, through LoCicero claims that her work was superior. In June of 1991, LoCicero inquired again about the promotion, and was allegedly told by Rossi that she would be promoted to Pictorial Artist. On September 6, 1991, LoCicero was laid off without receiving the promotion. On September 12, 1991, LoCicero filed a Charge of Discrimination with the California Department of Fair Employment and Housing, alleging that Gannett discriminated on the basis of sex when it failed to promote her and selected her to be laid off. LoCicero's complaint was forwarded to the EEOC. Additionally, on September 12, 1991, LoCicero filed a grievance with Local 831, claiming that Rossi had promised her a promotion to

Pictorial Artist which she never received. Shin Chong Yong is a 51- years- old male, who was employed with Gannett for 17 years. Shin was one of four artists who worked almost exclusively on outdoor billboards, which are generally exposed to less scrutiny and require less artistic ability and skill than studio work. On January 15, 1986, Shin was warned in writing about the quality and timeliness of his work, but he received no other written warning during his tenure at Gannett. Shin was one of the nine employees laid off on September 6, 1991, Gannett continued to employ two other outdoor artists, both of whom had less seniority than Shin and were under 40 years of age. In February of 1992, during his conversation with another former Gannett employee, Shin considered the possibility that he had been laid off because of his age, in violation of anti-discrimination laws. Thereafter, Shin met with an EEOC representative, who advised him that he did not have a viable claim. Based on the EEOC representative's statement, Shin did not file an EEOC complaint. However, Shin claims that he later sought legal advise and, as a result, filed an "affidavit of complaint" on June 19, 1992. On July 16, 1992, Shin filed a charge of discrimination with the EEOC.

DISCUSSION

A. The Standard

Upon a showing that there is no genuine issue of

material fact as to particular claims, the Court may grant summary judgment in the plaintiff's favor upon all or any part thereof. See W. Schwarzer. A.W. Tashima, J. Wagstaffe, Federal Civil Procedure Before Trial at § 14:33 (citing Fed. R. Civ. Pro. 56 (a) , (b). The standards and procedures are the same as for summary judgment of a claim. Id.

Rule 56 (c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed, R, Civ. P. Rule 56 (c). Whether a fact is material is determined by looking to the substantive law. Anderson V. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law...." Id. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. At 256. Rule 56 (e) provides that "(w) hen a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provide in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fe. R. Civ. P. Rule 56 (e).

As the Supreme Court explained in Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986):

> When the moving party has carried its burden under Rule 56 (c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."477 U.S, at 586-87. A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317, 322-23 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress and Company 398 U.S. 144 (1970).

However, an alleged "genuine issue" will not defeat summary judgment where the factual context makes the non-movant's allegations implausible. See California Architectural Bldg. Prods., Inc. V. Franciscan Ceramics, Inc., 818 F 2d

1466, 1468 (9th Cir. 1987), cert. denied, 848 U.S. 1006 (1988). Consequently, where the factual context makes the non-movant's claim implausible, the non-movant "must come forward with more persuasive evidence to support their claim than would otherwise be necessary" to show that there is a genuine issue for trial. Id.

B. Analysis

1. Releases Signed By Plaintiffs

According to defendant Gannett, the "core" of plaintiffs' actions are their claims that Gannett should have continued to employ them, and should have laid off someone else. Gannett contends that plaintiffs released any such claims in consideration of a valuable severance package.

At the time of the layoff, both LoCicero and Shin were given a Waiver and Release of Claims Agreement (the "Release"), and were permitted ten days to review it. The Release states:

> I . . . . do waive and relinquish any recall rights or claims I may have to any future employment, in Local 831, with Gannett of Southern California in exchange for severance pay. . . . .

See Rossi Decl., Exs. D & D. In exchange for signing the Releases, LoCicero received $4,880.80, and Shin received $13,913.60. Id. Gannett argues that is entitled to summary judgment based on the signed releases.

The claims raised in the instant action are not exclusively for reinstatement. Gannett offers no authority or argument for the proposition that, by signing the Releases, plaintiffs waived any rights beyond their "recall rights" or claims to future employment. The scope of the Releases raises an issue of fact, and Gannett is not entitle to summary judgment on this ground.

2. ERISA Claims

LoCicero's Fourth Cause of Action' and Shin's Second Cause of Action are bought under the Employee Retirement Income Security Act ("ERISA") § 510, 29 U.S. C. §1140. As employees of Gannett and members of Local 831, plaintiffs LoCicero and Shin participated in the Local 831-Employer Pension

---

' LoCicero's Complaint erroneously labels the ERISA claim as the Third Cause of Action Plan. Plaintiffs allege that Gannett excluded employees over the age of 55 from the layoff to protect its own interest in the pension plans, by avoiding liability on the pensions of older employees over the age of 55 from the layoff, and the Unions acquiescence in that exclusion, constitutes a violation of ERISA.

However, neither Gannett nor the Union has any interest in the employee benefit trust fund. "(T)he fiduciary requirements of ERISA specifically insulate the trust from the

employer's interest." N.L.R.B. v. AMAX Coal Co., 453 U.S. 322, 333, 101 S.Ct. 2789, 2796, 69 L. Ed. 2D 672 (1981). The trust funds are legal entities distinct from both the employer who pays the contributions and the Union, which represents the beneficiaries. Id.

Nor did Gannett have any reason to make layoff decisions on the basis of the pension plans. Under the Collective Bargaining Agreement, Gannett made the same contribution for each employee, regardless of seniority or whether the employee was vested. See Collective Bargaining Agreement, Article XIV, Exhibit A to Rossi Decl.

Plaintiffs concede that no genuine issue of fact exists as to the alleged ERISA violation, and that Gannett and the Union are entitled to summary judgment on the ERISA claims.

3. Breach of Collective Bargaining Agreement Under § 301 of the LMRA

LoCicero's Third Cause of Action is for Breach of the Collective Bargaining Agreement and Unfair Representation. This sort of hybrid claim for an employer's breach of collective bargaining agreement and the union's breach of the duty of fair representation arises under § 301 of the Labor-Management Relations Act, 29 U.S. C. § 185 ("LMRA").

LoCicero alleges that, under the earlier April 1, 1988, collective bargaining agreement, she had requested a

promotion and was told she would be considered. Gannett subsequently denied her promotion request. Locicero further alleges that she laid off by Gannett in breach of Article V of the September 1, 1991 Collective Bargaining Agreement. On September 12, 1991, Locicero allegedly requested that a grievance be filed for both the denial of her promotion and her layoff. The Union, allegedly acting in bad faith, grieved only the denial of promotion. On September 16, 1991 Gannett denied Locicero's grievance and, on September 24, 1991, the Union denied prosecution. Locicero alleges that the Union's refusal to prosecute her grievances sanctioned Gannett's conduct, violated Article 21 of the April 1, 1988 collective bargaining agreement, and constituted a breach of the Union's fiduciary duty of representation. An employee is entitled to judicial review of a § 301 breach of contract claim against an employer only if she (1) exhausts the contractual grievance procedures, or (2) proves that the union's breach of its duty of fair representation prevented her from exhausting those procedures. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir. 1983). Here Locicero never filed a grievance regarding her layoff, and thus she did not exhaust her contractual procedures. See Mitchell Decl., Ex. H.

---

2 Plaintiff Shin has not alleged breach of contract or unfair representation claims.

Accordingly, Locicero is entitled to judicial review of her breach of contract claim only if she can establish that the Union breached its duty of fair representation, Dutrisac, 749 F. 2D at 1274. A union breaches its duty of fair representation when its conduct towards a member of the collective bargaining agreement is "arbitrary, discriminatory or in bad faith." Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 910, 17 L.Ed. 2d 842 (1967). Just as other fiduciaries owe their beneficiaries a duty of care and a duty of loyalty, " a union owes employees a duty to represent them adequately as well as honestly and in good faith." Air Line Pilots Ass'n Intern'l. V. O'Neill, 111 S. Court 1127, 1134 (1991). The doctrine of fair representation exists to ensure that unions serve the interests of all members equally, without hostility or discrimination toward some. Vaca, 386 U.S. at 177, 87 S.Ct. at 910. Locicero claims that the Union breached its duty of fair representation by failing to prosecute two grievances on her behalf, one regarding Gannett's failure to promote her and the second regarding her layoff. Locicero argues that the Unions decision not to prosecute her grievances was at least arbitrary, and possible in bad faith. The doctrine of unfair representation has been narrowly construed where it relates to a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining

Agreement, or in presenting the grievance at an arbitration hearing." Petersonv. Kennedy, 771 F.2d 1244, 1254 (9th Cir.) cert. denied, 475 U.S. 1122. The union's effectiveness requires that it have discretion to act on behalf of its members, and thus the courts refrain from second-guessing a union's good faith judgments. Id. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued. Id. Thus, the Ninth Circuit has never held that a union acted arbitrarily "where the challenged conduct involved the union's judgment as to how best to handle a grievance." Id. In opposing the present motion, Locicereo simply argues that the question whether the union acted arbitrarily or in bad faith is one of fact. This argument, though accurate, is an inadequate response to the defendants' motion. A question of fact will not preclude summary judgment unless the nonmoving party comes forward with some evidence that a genuine issue exists. With respect to the promotion grievance, Locicero offers no evidence that the Union's refusal to prosecute was arbitrary or in bad faith. Indeed, the evidence reflects the Union's considered judgment of Locicero's grievance. On September 13, 1991, Grant Mitchell, the Union's business manager and chief elected officer, received Locicero's "promotion grievance" and forwarded it to Gannett's legal counsel, Ronald Beals. See Mitchell Decl., para. 11. by letter dated September 6, 1991,

Mr. Beals indicated that the grievance was meritless because the promotion sought was totally within the discretion of Gannett's management, and because it was filed after Locicero had already been laid-off. See Mitchell Decl., Ex. I. By letter dated September 24, 1991, Mitchell advised Locicero that Beal's statement was correct, and that unfortunately the Union would not prevail if it pursued her grievance. Id., Ex. J. Mr. Mitchell provided three reasons for his conclusion: (1) the promotion grievance arose under a collective bargaining agreement which had expired prior to the filing of the grievance; (2) the grievance was filed after Locicero was laid off; and (3) the selection of employees to fill the position sought by Locicero was and had always been the sole prerogative of Gannett's management. Id. Lacking a scintilla of evidence that the Union's decision not to prosecute Locicero's promotion grievance was arbitrary or in bad faith, the Court must defer to the Union's judgment on the merit of the grievance. Locicero further alleges that the Union arbitrarily and in bad faith refused to file or prosecute a grievance regarding her layoff. However, Locicero never filed a written grievance with regard to her lay off, and she admits as much. See Locicero Depo., Exhibit M to Segall Decl. Locicero argues that her failure to pursue a grievance was based on a September 12, 1991 conversation in which Grant Mitchell, the Union's business manager, advised her that a

Layoff grievance would be futile. Id. Mitchell denies participation in any such conversation. See Mitchell Decl., para. 5. Assuming, arguendo, that Mitchell did advise Locicero that a layoff grievance would be futile, such advice would not create a genuine issue as to the Union's arbitrary or bad faith conduct. As discussed earlier, the Union has broad discretion in handling grievances, a process in which the Court should hesitate to interfere. See Peterson, 771 F. 2d at 1254. Locicero offers no evidence to suggest that Mitchell's statement, if he made it, was anything other than a realistic assessment of the merits of Locicero's grievance. As Mitchell knew, the September 1, 1991 Collective Bargaining Agreement provided Gannett with wide discretion to select employees for layoff. Even when all the evidence is construed in favor of Locicero, it is insufficient o raise a genuine issue as to the Unions breach of the duty of fair representation. Locicero has simply failed to offer any evidence that the Union acted arbitrarily or in bad faith, whereas defendants have come forward with persuasive evidence to the contrary. Because Locicero did not exhaust the contractual grievance procedures, and cannot establish a genuine issue as to the Union's breach of its duty of fair representation, her § 301 breach of contract claim is barred. Dutrisac, 749 F.2d at 1274.

Defendants are entitled to summary judgment.

4. Employment discrimination

Shin's First Cause of Action is for Age Discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). Locicero's First Cause of Action is for Sexual Harassment in violation of the Civil Rights Act of 1991. Locicero's Second Cause of Action is for sex discrimination in violation of Title VII.

A. Shin's Age Discrimination Claim

Gannett and Local 831 argue that Shin's age discrimination claim is barred because he failed to file a timely administrative charge. Prior to filling suit under either Title VII or the ADEA, an employee must file a charge of discrimination with the EEOC within 300 days of the alleged discriminatory practice. 42 U.S.C. § 2000e-5 (e); 29 U.S.C. §626 (d). Shin argues that he has met the filing deadline by his June 19, 1993 "affidavit of complaint, " filed 289days after his termination. However, the EEOC has no record of receiving this document. See burris Decl., Exhibit A to Gannett's Reply. It was not produced by Shin during discovery, but appeared for the first time in response to the present summary judgment motion. See Sulzer Decl., para. 2. The only charge of discrimination which appears on the EEOC records was filed on July 16, 1992, 317 days after Shin was terminated. Thus, the administrative charge was not timely filed as required under the ADEA. Alternatively, Shin argues that the filing period is equitably tolled, since he was

Not aware of the possibility that he may have been the victim of age discrimination until several months after his termination

This argument is unpersuasive. The 300-day limitation period of the ADEA may be equitably modified in two circumstances: (1) where the plaintiff is excusably ignorant of the limitations period and there is no prejudice to defendant; and (2) where the plaintiff's failure to file a timely charge is the result of the defendant's misleading conduct. See Naton v. Bank of California, 649 F,. 2D 691, 696 (9th cir. 1981). Shin admits at the time of his termination, he knew Gannett had retained younger outdoor artists. See Shin Depo., at 25 Shin does not contend to have been ignorant of the 300-day limitations period, nor has he raised allegation or evidence of misleading conduct by Gannett. Indeed, Shin apparently retained an attorney prior to the expiration of the 300-day period, an act which has been held to extinguish the equitable reason for tolling the limitations period. See Hay V Wells Cargo, Inc., 596 F. Supp. 635, 640 (D. Nev. 1984; see also Morse v Daily Press, Inc., 826 F,. 2D 1351 (4th Cir.), cert. Denied, 484 U.S. (1987); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F. 2D 1195 (5th Cir. 1975. Shin asserts that the timeliness of his EEOC charge raises a triable issue of fact, citing Aronsen v. Crown Zellerbach, 662 f.2d 584, 593 (9th Cir.), cert denied, 459 U.S. 1200 (1983) to support his position. However, Aronsen is inapposite, and

Relates only to the existence of a triable issue where an employee does not know the date of his termination. Shin offers no plausible excuse for his delay in filing the EEOC charge. His ineffective attempt to file a complaint on June 19, 1991, if it actually occurred, is insufficient to toll the limitations period. See Hay, 596 F. Sup. At 639 (sporadic and ineffective attempts to pursue age discrimination claim do not equitably toll limitations period). Contrary to Shin's assertion, there is no genuine issue of fact as to when the 300-day period began to run, or as to the timeliness of his EPOCH charge. Gannett and Local 831 are entitled to summary judgment on Shin's age discrimination claim.

B. Locicero's Sex Harassment Claim

Defendants argue that Locicero's sex harassment claim is barred because her EEOC charge failed to assert sexual harassment allegations. Locicero concedes that her EEOC charge did not include a sexual harassment claim, but argues that the EEOC is to blame for this omission. Locicero claims that she advised the EEOC intake counselor that she had been sexually harassed, but was told that the EEOC did not handle such claims against co-workers. See Locicero Decl., para, 6, Accordingly, Locicero abandoned her administrative claim of sexual harassment. Under Title VII, "the scope' of the judicial complaint may not exceed the scope' of the EEOC investigation which can reasonable be expected to grow out of

The charge of discrimination." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th cir. 1970; Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F. 2D 726 (9th Cir.) (disparate impact charge filed with EEOC did not encompass claims of intentional sex discrimination), cert. Denied 469 U.S. 1108 (1985). Locicereo's September 12, 1991 EEOC charge states, in relevant part, as follows:

I believe that I was not promoted and that I was laid off because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended. See Locicero's complaint, Ex. 3. The charge makes no reference to sexual harassment, absent some such allegation, the EEOC could not reasonably be expected to investigate the existence of a "hostile work environment." Locicero essentially admits as much. See Plaintiffs" depo. At 18. The present sexual harassment allegations are not closely related to the prior disparate treatment charge that the EEOC's action on the sexual harassment claims would be redundant. Brown, 732 F 2d at 730. The EEOC did not have an opportunity to consider the sexual harassment claims before the instant lawsuit was filed. " bypassing the administrative process under such circumstances frustrates the policy of encouraging informal conciliation and fostering voluntary compliance with Title VII." Id. The scope of Locicero's EEOC charge is not broad enough to encompass her present sexual harassment claim,

The defendants are entitled to summary judgment on Locicero's First Cause of Action.

c. Locicero's Sex Discrimination Claim

Locicero's Second Cause of Action alleges employment discrimination under a disparate impact theory against defendant Gannett.

3 Locicero's First Cause of Action purports to state a claim against both Gannett and Local 831, although few facts concerning Local 831 are alleged. Locicero never filed an administrative claim alleging any type of discrimination against Local 831, and therefore Local 831 is entitled to summary judgment on the first cause of action.

Locicero claims that Gannett utilized discriminatory selection procedures in making promotion and layoff decisions. Locicero contends that she was not promoted to Pictorial Artist, and was subsequently laid of, because she is a woman. Gannett argues that Locicero has no evidence that it discriminated on the basis of sex in making promotion or layoff decisions, and therefore has failed to raise a genuine issue of fact. Under Title VII, Locicero bears the initial burden of establishing a prima facia case of discrimination by demonstrating that she sought and was qualified for a job which was denied her, but remained available to persons outside the protected class. See McDonnell Douglas Corp. V. Green, 411 U.S. 792, 902, 93 S. Ct. 1817, 1824 (1973. If she

If she is able to do so, the burden of production shifts to Gannett to offer evidence of a legitimate, non-discriminatory basis for its promotion and layoff decisions. Id. If Gannett makes such a showing, Locicero must establish that the proffered neutral basis is merely a pretext for discrimination. Id at 804, 93 S. ct. At 1825. Here, Locicero has established that she sought and was qualified for a promotion to Pictorial Artist. Gannett's Bulletin Manager had made a preliminary determination that Locicero was promotable based upon artistic ability, and had told her so. See Rossi Decl., Ex. N. Locicero was ultimately denied the promotion, whereas three men were promoted. Gannett argues that it has demonstrated a legitimate, non-discriminatory basis for its promotion decisions. Gannett admits that it promoted three male journeyman to Pictorial Artist in 1990, but claims that these promotions occurred before layoffs were contemplated. Once it became apparent that some restructuring of job classifications would be necessary, all proposed promotions were put on hold. See Rossi Decal., Ex. N. No person, male or female, was promoted after Gannett determined to lay off employees. Gannett's failure to promote Locicero on the basis of pending contractual negotiations and potential job restructucturing is legitimate and non-discriminatory.

Locicero disputes the time period during which the three men were promoted, claiming that the promotions occurred in

February of 1991, Locicero contends that this dispute raise a triable issue of fact. However, Gannett has offered deposition testimony evidence that the promotions occurred in 1990, prior to Rossi's preliminary determination that Locicero was qualified to be a Pictorial Artist. See Rossi Decl., Ex. N. Locicero offers no evidence to the contrary. Moreover, Locicero makes no effort to show that Gannett's legitimate explanation for its failure to promote her is merely a pretext. Accordingly, Locicero has not sustained her burden on the claim for discriminatory failure to promote. With regard to her claim for discriminatory layoff, Locicero has established that she was laid off while male Journeyman were retained. But Gannett contends that it had a legitimate, non-discriminatory basis for the layoffs. In making layoff decisions, Gannett had discretion to consider the criteria set forth in Addendum A to the Collective Bargaining Agreement, based on said criteria, Allan Rossi and Toni Lopez created separate list of the nine employees to be laid off. Locicero's name appeared on both lists. Rossi considered Locicero's skill to be less than other artists, and he was aware of complaints that she participated in shouting matches and loud singing at her work station. See Rossi Decl., para. 6. Toni Lopez also considered such complaints of disruptive conduct. See Lopez Decl., para. 3. Of the nine laid off Gannet employees, Locicero was the only women. See Ripp Decl., para. 10. Thus,

Gannett's explanation for the layoff decisions appears to be legitimate and non-discriminatory. Locicero argues that Gannett's explanation is merely a pretext. She submits the declarations of former co-workers David Medore and Walte Stewart, both of whom stated that Locicero was not particularly disruptive and that the paint studio was generally noisy. See Medore Decl., para. 4; Stewart Decl., para. 4. However , Medore and Stewart were not the employees who had previously filed complaints about Locicero's disruptive conduct, See Lopez Decl., para. 3, and their opinions are therefore not particularly probative. Gannetts management was entitled to consider the fact that sone employees found Locicero's behavior distracting. As such, Locicero has failed to come forward with "specific and significantly probative evidence that [Gannetts} alleged purpose is a pretext for discrimination." See Schuler v Chronicle Broadcasting Co., 793 F. 2D 1010 (9th Cir. 1986). Because Locicero has not established that Gannett's facially neutral explanation for its layoff decisions is a pretext for discriminatory conduct, she has not sustained her burden, and Gannett is entitled to summary judgment.

CONCLUSION

For these reasons, the Court HEREBY GRANTS Gannett Outdoor Co.'s motion for summary judgment and Local 831's motion for summary judgment. It is so ordered June 10, 1993. John G. Davies - United States District Judge

APPENDIX C

Relevant Statutes:

FEDERAL RULES OF CIVIL PROCEDURE 56 (c)

Provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

FEDERAL RULES OF CIVIL PROCEDURE 56 (e)

Provides that "when a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

FEDERAL RULE OF CIVIL PROCEDURE 26 (1) (a) (ii)

In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter

Involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

SECTION 703 OF THE 1964 CIVIL RIGHTS ACT

(42 U.S.C. 2000e-2

(as amended by sections 105 and 106) is further amended by adding at the end the following new subsection: "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color religion, sex or national origin or such individual or group on account of imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

§ 2000e-2. Unlawful employment practices

(a) Employer practices: It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his employees or applicants for employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's race, color, religion, sex, or national origin.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 13 (5)

For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reason why an extension of time is justified.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved: and no fact tried by jury, shall be otherwise re-examined in any court of the United States than according to the rules of common law.——*(Id.)*

APPENDIX C CONTINUED

Amendment XIV

Citizenship, Representation and Payment of Public Debt.

Section 1

Paragraph 2: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law , nor deny to any person within its jurisdiction the equal protection of the laws.